

# CHILDREN & FAMILY LAW APPELLATE BULLETIN

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## APPELLATE PANEL "NETWORKING/SUPPORT"

Our recent Children and Family Law support/networking meetings have been a great success. Fifteen appellate attorneys attended our February 14 meeting at the Boston Juvenile Court. Our March 9 meeting in Springfield was postponed due to inclement weather, and has been rescheduled for April 20, 2001 from 3:00-4:30 p.m. at the Springfield Juvenile Court, lower level conference room. We will also hold a brown bag lunch meeting at the Worcester Juvenile Court on May 9, 2001 from 1:00-2:00 p.m. (room to be assigned that day). We hope to see you at one (or both) of these upcoming meetings. At the meeting, we will distribute a list of CAFL appellate attorneys so you may network among yourselves. We will also solicit your ideas for how we can better serve the needs of the appellate panel. If you have a case or question you would like us to discuss at a future meeting, please let us know in advance.

## ORAL

Please let us know if you get oral argument in your case. We like to attend each argument. We are also available to "moot court" your argument, in person or over the phone, if you would like to rehearse or just bounce ideas around. Similarly, please let us know if your application for further appellate review is accepted by the Supreme Judicial Court. Under certain circumstances, the Committee for Public Counsel Services may be interested in filing an *amicus curiae* brief in your case. If you are interested in volunteering to "moot court" a case for your colleagues, please let us know.

## JUSTICE DUFFLY TO SHARE SCREENING ROLE

Appeals Court Justice Fernande Duffly is currently sharing with Justice Charlotte Perretta the job of screening incoming child welfare appeals for oral argument. As before, the screening justice's decision (as to whether or not the issues in the case have potential precedential value and warrant oral argument) is only a "suggestion"; the three-justice panel considering the case has the power to hear argument on a case if it so chooses. Justice Perretta does not sit on any panels that hear child welfare appeals. Justice Duffly does not sit on panels for child welfare cases she has screened. Justice Perretta will still be the

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## WHOM DO I CALL AT THE CHILDREN & FAMILY LAW PROGRAM?

### *For assistance with a case:*

Please direct any calls regarding strategic, research or informational assistance regarding a *parent* client (whether appellant or appellee) to Staff Attorney Julie Hall at (617) 988-8408 or Co-Director Margaret Winchester at (617) 988-8405. Please direct any such calls regarding a *child* client (again, whether appellant or appellee) to Staff Attorney Andrew Cohen at (617) 988-8310 or Co-Director Susan Dillard at (617) 988-8307.

### *For assistance with an assignment:*

Please call us when you are ready for more work. If you are available for a new Children & Family Law appellate assignment, contact Andrew Cohen at (617) 988-8310. If for any reason you are unable to complete an assignment, or discover a conflict of interest between or among clients, please contact us immediately. We will reassign the case provided this will not prejudice the client.

If you have questions regarding one of your assignments as appellate counsel, contact Rita Caso, Appellate Assignment Coordinator, at (617) 988-8444.

### *For questions regarding malpractice liability insurance:*

Please call Rita Caso at (617) 988-8444 if you have questions regarding malpractice insurance.

single justice for motions.



## COPIES OF BRIEFS, FAR and DAR APPLICATIONS, AND 1:28 DECISIONS

Please remember to send us a copy of your brief when you file it. If the case closes without the need to file a brief, let us know the manner of its resolution (e.g., dismissed for failure to docket, voluntary dismissal as a result of open adoption agreement) in a letter directed to Susan Dillard's attention.

Also, please send us a copy of any application for further or direct appellate review that you file, and any Rule 1:28 decisions you receive in your appeal.

## TIPS FOR APPELLANTS

### 1. Don't Forget to Show "Harm"

Most evidentiary challenges on appeal - including those that show indisputable error by the trial court - are dismissed by the Appeals Court as harmless error. Typically, the Appeals Court states, "Even if the trial judge erred in admitting X into evidence, we believe such error was harmless because of other evidence of parental unfitness." Therefore, if you are challenging the trial court's admission of evidence, you must show the harm the wrongful admission caused. This is a two-step

process. First, you must show that certain findings must be disregarded because they lack support or rely on improperly admitted evidence. Second, you must show that the findings that remain (i.e., those that are based on proper evidence) do not constitute clear and convincing evidence of unfitness. Do not be disheartened if you can only "eliminate" a few out of dozens of findings if those you attack are the most damaging. Recent Appeals Court panels at oral argument have been very receptive to the idea that the remaining findings add up to "only" problematic or imperfect parenting, rather than parenting rising to the level of unfitness.

### 2. Lack of Nexus

In several recent oral arguments, the Appeals Court panel has focused on the lack of nexus between the appellant-parent's "problem" and his or her care of the subject children. Both Adoption of Katharine, 42 Mass. App. Ct. 25 (1997) (substance abuse) and Care and Protection of Bruce, 44 Mass. App. Ct. 758 (1998) (mental health), require that DSS prove, and the court find, a nexus between the alleged problematic behavior or condition and the parents' caretaking abilities before permanently removing children from the home. If your case concerns substance abuse, mental health issues, domestic violence, or other problematic behaviors, review the trial court's findings for a showing of a nexus between the behavior and the children's well-being. Not all "bad" behavior affects parenting. If the nexus is not there, bring that to the appellate court's attention.

### 3. Further Appellate Review

Note that, under Commonwealth v. Gorassi, 432 Mass. 244, 244 n.1

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(2000), and Commonwealth v. Lombard, 419 Mass. 585, 593 (1995), all issues decided by the Appeals Court are before the S.J.C. on further appellate review unless the S.J.C. expressly limits the scope of its review. Therefore, you must be prepared to argue (and, if there is further briefing, to brief) all issues addressed by the Appeals Court.

#### **4. Vacating Assembly**

In a recent appeal, an attorney asked Justice Perretta to vacate assembly of the record when the trial court had failed to order transcripts of certain pre-trial hearings. Justice Perretta asked the attorney what the missing transcripts contained and whether the missing information was germane to the appeal. When the attorney did not know, she denied his motion. Therefore, if you are seeking to vacate assembly as a consequence of missing transcripts (or, presumably, any other missing evidence), you must make a proffer to the Appeals Court about the contents of the missing record and how the absence of the information therein will harm your client. This will require a cooperative effort with trial counsel, who is in the best position to know the contents of the missing transcript.

### **TIPS FOR APPELLEES**

#### **1. Challenging the Judgment**

Justice Porada of the Appeals Court made clear at a recent argument that children challenging the judgment without filing a notice of appeal was a recurring problem, and that such challenges were inappropriate. Accordingly, we would like to reiterate certain information we featured in the last appellate bulletin.

As you will recall, you are not permitted to challenge the judgment or seek a more favorable outcome if you have not filed a notice of appeal. See Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 43 n. 5 (1977); M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, Inc., 348 Mass. 682, 684 (1965). If there is any aspect of the judgment your client wishes the appellate court to modify, you must file your own notice of appeal. You cannot simply file a blue brief as an appellee or a red brief challenging the judgment.

The need to file a late notice of appeal usually (but not always) arises in three contexts involving appellee-children: (1) your

client changes his or her mind about being adopted during the pendency of the appeal; (2) your client is satisfied that he or she has been freed for adoption, but wants some form of post-adoption contact with parents or siblings that was not in the decree dispensing with consent; (3) a child client disagrees with the judgment but his or her trial attorney failed to file a notice of appeal thinking the child could simply “tag along” with the parent’s notice of appeal and be considered another appellant. In any of these scenarios, chances are that, by the time the problem comes to light, you are beyond the 30-day period to file a notice of appeal under Mass. R. App. P. 4(a). Note that, under Rule 4(a), you get an additional fourteen (14) days to file a notice of appeal if another party has filed one in a timely fashion. Also, under Rule 4(c), the trial court may, upon a showing of excusable neglect, extend the appeal period an additional 30 days, whether or not the request to enlarge the time was filed within the initial 30 days. Under Mass. R. App. P. 14(b), a single justice of the Appeals Court may grant an enlargement of the period to file a notice of appeal up to one year after entry of the judgment. If you are beyond one year, then your client is probably out of luck. (Perhaps you can ask the court to allow your client to intervene, or to file an amicus brief.) In any event, if you have been allowed to file a late notice of appeal, make sure that you make that fact clear in the procedural history section of your brief.

In representing a child on appeal, remember that you are not bound by the position taken by trial counsel. In fact, you are required under CPCS Appellate Performance Standard 4 to determine independently your child client’s position. You should determine your client’s position as soon as possible after you are assigned to the case, in part to avoid the problem discussed above.

#### **2. Going Outside the Record at Oral Argument**

Presenting facts outside the record at oral argument is not permitted by the rules and is poor appellate practice. See Adoption of Inez, 428 Mass. 717 (1999) (Appeals Court cannot consider post-trial information not before trial court). An attorney should speak to facts outside the record (such as the status of the child's current placement) only when necessary to answer questions from the panel. When an appellate judge asks the attorney about a party's current

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status, we recommend that the attorney respond, "To answer that I'll have to go outside the record, but I will do so if the court wishes me to." If the court answers affirmatively, then the attorney should answer the question in a succinct fashion.

In a recent oral argument before the Appeals Court, the child's attorney introduced himself and then immediately asked the panel if it wanted to know how the child was doing. When the panel answered in the affirmative, the attorney launched into a detailed outside-the-record discussion of the child's current status. Although the panel had allowed the attorney to address facts outside the record, it was clearly (and, perhaps, unfairly) displeased by it, and proceeded to grill the attorney for the next five minutes on his contact with the child and the bases for his representations to the court. (The attorney in this case had visited and spent considerable time with the child, a fact that he was able to represent to the panel.) The panel then noted that the attorney should not be giving eyewitness testimony to the court and asked the attorney to focus on the record for the remainder of the argument.

Going outside the record at argument presents another problem. If child's counsel is permitted to address the panel about the child's current status, fairness dictates that counsel for the appellant-parent (who is not allowed rebuttal argument) be allowed to rebut that information or submit other information (in the form of a letter or affidavit) about the parent's current status. This practice is not contemplated by the rules of appellate procedure.

This is not to say that there are no appropriate ways to bring post-trial events to the attention of the Appeals Court. In a recent case, counsel for a mother successfully filed a motion to expand the record and for the court to take judicial notice of certain post-trial legal proceedings (a divorce judgment and a criminal conviction).

### 3. Dividing Time with DSS

DSS is usually the appellee in child welfare appeals, and the appellee-child usually must share time with DSS at oral argument. If you are at the Appeals Court, that means

that the child and DSS share only fifteen minutes. The traditional practice is that DSS goes first, followed by the appellee-child. Regardless of how the attorneys agree to split the time, DSS often takes more than its allotted share and leaves the appellee-child with only a few minutes to argue. This may be because the panel has many questions; it may be because the DSS attorney is simply not aware of the passage of time.

Such a division and order of argument may be appropriate in certain cases. However, in some cases the child's arguments may be different from DSS' arguments; or, in cases where there is an identity of issues, the child's brief may be stronger. If you represent an appellee-child and you believe that your arguments merit more meaningful consideration by the appellate court, we recommend that you try to arrange with DSS that you will argue first (or, if DSS won't agree, to at least flip a coin). This will also impress upon the appellate courts that the child's attorney in these cases is present in order to make legal arguments and advance the child's theory of the case, not merely to give the court an update on the child's current status.

### RECENT CHILD WELFARE DECISIONS

Some of the child welfare cases published during the end of 2000 and the first quarter of 2001 are listed below:

Adoption of Arnold, 50 Mass. App. Ct. 743 (2001) (Indian Child Welfare Act; sexual abuse hearsay);

Adoption of Edmund, 50 Mass. App. Ct. 526 (2000) (Right of incarcerated parent to participate in c. 210, § 3 proceedings);

Adoption of Georgia, 432 Mass. 62 (2000) (Admissibility of CASA reports; qualifications of CASAs; impartiality of judge);

Adoption of Holly, 432 Mass. 680 (2000) (Due process/notice to non-custodial parent; right to counsel; ineffective assistance of counsel);

Adoption of Keefe, 49 Mass. App. Ct. 818 (2000) (Profile/syndrome evidence; Munchausen Syndrome by Proxy);  
Adoption of Lorin, 50 Mass. App. Ct. 561 (2000) (Post-adoption parental and sibling visitation);  
Adoption of Marc, 49 Mass. App. Ct. 798 (2000) (Right to evidentiary hearing on motion for relief from judgment);  
Commonwealth v. Super, 431 Mass. 492 (2000) (Right to continuance in light of need to produce witnesses on short order);  
Guardianship of Yushiko, 50 Mass. App. Ct. 157 (2000) (Removal of guardian absent prior findings of parental unfitness);  
Theresa Canavan's Case, 432 Mass. 304 (2000) (Reliability of methodology of expert);  
Troxel v. Granville, 120 S.Ct. 2054 (2000) (Constitutionality of third-party visitation statute).

#### **FIRST HALF FISCAL YEAR 2001**

In the first half of Fiscal Year 2001 (July 1 to December 31, 2000), the Children & Family Law Program issued approximately 100 new assignments for 44 appeals. We also had eight reassignments for attorneys who have left the practice, had conflicts of interest, or could not accept or continue with the appointment for one reason or another. If, in fact, these numbers represent half of the Fiscal Year 2001 totals, the number of assignments is down considerably from last year.

#### **INTERLOCUTORY APPEALS**

Currently, CAFL trial attorneys do their own interlocutory appeals. The CAFL program is contemplating permitting trial attorneys the option of asking us to (a) assign interlocutory appeals to members of the appellate panel, or (b) assign them mentors from the appellate panel. If you would like to be on a list to be considered for single justice assignments of either type please let us know. We will let you know if this change in practice goes into effect.

#### **NEW APPEALS COURT JUSTICES**

To date, ten new Appeals Court justices have been appointed by the governor. They are, in order of appointment:

Justice Elspeth Cypher (C) (from the Bristol County D.A.'s Office)  
 Justice John Mason (M) (from large firm private practice)  
 Justice Joseph Grasso, Jr. (Gr) (from Superior Court)  
 Justice Marc Kantrowitz (Kn) (from Juvenile Court)  
 Justice William Cowin (Cw) (from large firm private practice)  
 Justice Janis Berry (By) (from large firm private practice)  
 Justice Cynthia J. Cohen (Co) (from private practice)  
 Justice Gordon Doerfer (Do) (from Superior Court)  
 Justice James McHugh (Mc) (from Superior Court)  
 Justice Scott Kafker (Kf) (from Massachusetts Port Authority)

The panel designation initials are in parentheses. Please contact Andrew Cohen at the CAFL Program if you would like additional information about any of the justices.